Filed 10/19/09 In re V.T. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re V.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. V.T., Defendant and Appellant.	F056048 (Super. Ct. No. 07CEJ601829-1) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Gomes, Acting P.J., Dawson, J. and Kane, J.

Following a contested hearing, the juvenile court sustained allegations of lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)) against V.T. (appellant). The court found the offense to be a felony and that the maximum period of confinement was eight years. The court committed appellant to the Division of Juvenile Justice.

Appellant contends the juvenile court erred by denying his motion to suppress statements he made to police officers before he was advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also contends the court abused its discretion when it committed him to the Division of Juvenile Justice. We disagree and affirm.

FACTS

At about 8:00 a.m. on November 19, 2007, Raymond R. dropped off his seven-year-old daughter E. with his sister, Delores, so that Delores could babysit E. Appellant is Delores's then 17-year-old son.

While at Delores's, E. went into appellant's room to play a video game. At first, appellant helped her with the game. He then pulled down his pants and underwear, exposing his penis. Appellant reached into E.'s shorts and underwear and touched her vagina. Appellant asked her if it tickled, and she said no. Appellant then told E. to lick his penis, but she refused.

E. told Delores what had happened. When Raymond picked up E. in the evening, Delores told him that appellant had exposed himself to E. Raymond called the police.

After speaking with Raymond and E., Officers Channon High and Thong Her spoke to Delores on the telephone and then went to the house to speak to appellant. When they arrived, appellant was sitting on the living room couch crying. Officer Her stayed with appellant's parents in another room while Officer High spoke to appellant and told him why they were there. Appellant continued to cry and spoke little.

Officer Her then traded places with Officer High and spoke to appellant. Appellant continued to cry and said he did something "real bad" and it was "worse than

murder." Officer High subsequently spoke to appellant a second time, but got little response.

Appellant's mother then came out and asked to speak with appellant. She told him that things were all right and that he needed to admit what he had done so that he could get help. Appellant continued to cry, but said "I did it." Officer High asked appellant what he did, and he told her "he showed his cousin his genitals and told her to lick it." Officer High then arrested appellant.

Appellant was advised of his *Miranda* rights and was transported to the police station. Once there, he was again advised of his rights and asked whether the statements he made at the house were true. Appellant replied that they were.

Appellant moved in limine to suppress "any and all statements attributed to [appellant] on the police report." (Capitalization omitted.) The juvenile court denied the motion.

DISCUSSION

1. Denial of Motion to Suppress the Confession

Appellant contends that his statements to the officers and in response to his mother were taken in violation of *Miranda* because he was subjected to custodial interrogation at the time without being given his *Miranda* warnings. We disagree.

It is settled law that a defendant's statements are inadmissible if they stem from a custodial interrogation unless the defendant was first advised of his or her *Miranda* rights. (See *Berkemer v. McCarty* (1984) 468 U.S. 420, 428-429.) Likewise, statements obtained from minors in violation of *Miranda* are inadmissible in juvenile proceedings held pursuant to Welfare and Institutions Code section 602. (*In re Roderick P.* (1972) 7 Cal.3d 801, 810-811.) The hallmark of custodial interrogation is "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" (*Berkemer v. McCarty, supra*, at p. 428, quoting *Miranda, supra*, 384 U.S. at p. 444.) Interrogation in this context is defined as "any words or actions on the part of the police that the police should know are

reasonably likely to elicit an incriminating response." (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1089.)

The existence or absence of custody is based upon an inquiry into "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125, quoting *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) The issue of whether the person is "in custody," "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323.)

Factors relevant in determining whether an interrogation is custodial include:

> "[W]hether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

"[C]ourts [also] consider highly significant whether the questioning was brief, polite, and courteous or lengthy, aggressive, confrontational, threatening, intimidating, and accusatory." (*Id.* at p. 1164.) "No one factor is dispositive." (*Id.* at p. 1162.)

In making an objective assessment of the custody issue for purposes of *Miranda*, the linchpin is whether a reasonable person in the particular circumstances would feel that his or her freedom of movement has been restricted to the degree associated with formal arrest. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662; *Berkemer v. McCarty*,

supra, 468 U.S. at p. 440; *California v. Beheler*, *supra*, 463 U.S. at p. 1125.) Individual characteristics of the suspect, such as age and experience with law enforcement, are not relevant to this objective test. (*Yarborough v. Alvarado*, *supra*, at p. 668.) Since the passage of Proposition 8 in 1982, the federal standard must be applied to *Miranda* issues. (*In re Lance W.* (1985) 37 Cal.3d 873, 896; see Cal. Const., art I, § 28, subd. (d).)

"[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question.… *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Oregon v. Mathiason*, *supra*, 429 U.S. at p. 495.) *Miranda* warnings are not necessarily required when a person is temporarily detained. (*People v. Farnam* (2002) 28 Cal.4th 107, 180.) "[T]he term 'custody' generally does not include 'a temporary detention for investigation' where an officer detains a person to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." (*Ibid.*, quoting *People v. Clair* (1992) 2 Cal.4th 629, 679; see also *Miranda*, *supra*, 384 U.S. at p. 477 ["General on-the-scene questioning as to facts surrounding a crime … is not affected by our holding"].)

For instance, in *People v. Mitchell* (1990) 222 Cal.App.3d 1306, 1309-1310, officers went to a residence to investigate a report that the occupant had threatened a neighbor with a gun. The officers contacted the suspect on the front porch and advised him of what they had been told, which led to the suspect making incriminating statements. The court concluded that the suspect was not in custody for purposes of *Miranda*. (*People v. Mitchell*, *supra*, at p. 1311.)

We apply the following standard of appellate review: The determination of whether a suspect is in custody for purposes of *Miranda* is a mixed question of law and fact. As to the factual circumstances of the interrogation, we review the juvenile court's findings under the deferential substantial evidence standard. As to the issue of whether a reasonable person under those circumstances would have felt his or her freedom of

movement was restricted to the degree associated with formal arrest, we review the issue de novo. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Here, the juvenile court ruled that the officers' questioning of appellant did not amount to a custodial interrogation.[1] Specifically, the court stated:

> "I've taken into consideration the totality of the circumstances of the interviews. First, amongst the things I've considered, was [appellant]'s age at the time being approximately 17-and-three-quarters years old, the manner of questioning, the location of questioning being in the minor's home, … the duration of the questioning and all those circumstances as testified to. I've considered the fact that from the testimony it was clear that the former minor was, in fact, to a limited extent, communicating, although most of it was nonverbal. There is no evidence before the court that at any time the former minor asked for an uncle, a parent, a lawyer or any other person. There's no evidence that he … was under the influence.… There's no evidence before the court that the former minor … was coerced or intimidated either by either of the officers or both of them combined or through the mother's statements to him. Investigation in and of itself, even though it involves questioning, does not amount to eliciting incriminating statements or an interrogation. It does not amount to necessarily a custodial interrogation. Based upon the totality of the circumstances, the court concludes that the initial contacts with the minor up until the time he was actually arrested was not a custodial interrogation, was merely an investigation, and therefore, there was no requirement for *Miranda* at that point in time."

The juvenile court also denied appellant's request to exclude the statements made after he had been read his *Miranda* rights when he was arrested, finding that there was nothing that would indicate appellant invoked his right to remain silent, asked for an attorney, or that he was in any way improperly coerced or intimidated. On appeal, appellant does not contend otherwise, only that, if we find that the earlier statements should have been suppressed, the later statements would be a tainted product of the first.

We acknowledge that there are several aspects of appellant's encounter with the officers that suggest it might have been custodial in nature. The officers initiated the

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[1]Although Officer High testified that she advised appellant of his *Miranda* rights before speaking to him, the juvenile court found the evidence of this conflicting and insufficient to establish that she advised appellant at that time.

contact, not appellant. Neither officer specifically informed appellant that he was free to terminate the interview or leave at any time.

But there are additional factors of those identified in *Aguilera* that support the juvenile court's conclusion that the interrogation of appellant was noncustodial. The officer made arrangements with appellant to speak to him in his home—a less coercive environment than a police station. Office High advised appellant generally why they were there. Although there were two officers present, they took turns questioning appellant. Officer High even asked appellant if he would be more comfortable speaking with a male officer. When appellant indicated he would, Officer High switched places with Officer Her. Appellant was not handcuffed nor physically restrained in any way. The record contains no indication that either officer was confrontational in their examination of appellant. Neither officer saw any signs that appellant was under the influence of alcohol or drugs. At no point did appellant ask for a break, ask that the questioning stop, or ask for his parents or a lawyer. The entire interview took an hour at the most.

And despite appellant's claim to the contrary, we do not see appellant's mother's comments—that things were all right and he needed to admit what he had done so that he could get help—as a police interrogation technique used to pressure appellant. Although Officer High testified that she encouraged appellant to speak to his mother, both officers testified that appellant's mother asked to speak to appellant, not that she was directed by the officers to say anything specific to appellant. Nor can appellant's mother's statement be seen as a promise that he would avoid incarceration or receive leniency of any sort. While a statement motivated by promises of leniency is involuntary and inadmissible, a confession is only invalidated by those techniques "which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313, 339-340.)

In *People v. Spears* (1991) 228 Cal.App.3d 1, detectives *Mirandized* the 19-and-one-half-year-old defendant and told him that it was "'about time you got this off your

chest,'" and that he would "'be better off'" if he spoke with them. (*Id.* at pp. 22, 27.) The defendant argued that these statements, along with his age, mental state, drug problem, and inexperience, rendered his subsequent statement involuntary. The court disagreed, concluding that the officer's suggestions amounted to nothing more than "the benefit which would naturally flow from pursuing a truthful and honest course of conduct." (*Id.* at p. 28, citing *People v. Jackson* (1980) 28 Cal.3d 264, 299 [officer's statement that defendant "would feel better" if he confessed did not constitute improper inducement], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; see also *People v. Hill* (1967) 66 Cal.2d 536, 548-549 [no improper police inducement where officer urged defendant to "help himself"].)

Because we find that the statements appellant made prior to being *Mirandized* were properly admitted, we need not further address his claim that the statements made later after receiving *Miranda* warnings were inadmissible as a product of the earlier "tainted" confession.

In any event, even if the juvenile court should have excluded the statements made to the officers, any error was harmless. An erroneous admission of a confession is not reversible per se. Instead, the judgment will be affirmed where the error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-311; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Johnson* (1993) 6 Cal.4th 1, 33, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

In *People v. Cahill* (1993) 5 Cal.4th 478, our Supreme Court gave several examples of when an erroneously admitted confession might be harmless, including "(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime [citation]." (*Id.* at p. 505.) "As these examples suggest, although in some cases a defendant's confession will be the centerpiece of the

prosecution's case in support of a conviction, in many instances it will be possible for an appellate court to determine with confidence that there is no reasonable probability that the exclusion of the confession would have affected the result." (*Ibid.*)

Here the evidence, without consideration of appellant's statements to the officers, consists of the following: E. testified that she was playing a video game in appellant's room when he pulled down his pants and underwear and exposed himself. Appellant touched E.'s "private" and asked her if it tickled. He then asked her to touch his private part and to "lick it." She later told a police officer what had happened. Delores testified that E. had been in and out of appellant's room all day and, at some point during the afternoon, E. told her that appellant had asked her to "lick something bad" and "pointed down." E.'s father testified that, when he picked up E. at the end of the day from Delores's house, Deloris told him appellant had exposed himself to E. In the evening, after officers spoke to appellant, Delores asked to speak to appellant. She encouraged him to admit what he had done so that he could get help. In response, appellant said, "I did it."

Given the relatively strong eyewitness evidence, the consistency of the evidence as related by E., her father, and Delores, and appellant's statement to his mother that he "did it," we conclude that any possible error in this case in admitting appellant's statements to the officers was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

We reject appellant's claim of prejudicial violation of his *Miranda* rights.

2. Division of Juvenile Justice Commitment

Appellant also contends that the juvenile court abused its discretion when it committed him to the Division of Juvenile Justice (DJJ). He specifically argues that his prior record is relatively minor, that his prior probation was two years ago, that he was not involved in gang activity, and that he has a number of psychological problems. According to appellant, he "needed services" and "it remains unclear why he could not get those services in a less secure setting."

The juvenile court's decision to commit a minor to the DJJ will be reversed only when an abuse of discretion has been shown. (*In re George M.* (1993) 14 Cal.App.4th 376, 379.) The record must demonstrate a probable benefit to the minor by the DJJ commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. But a DJJ commitment may be considered without previous resort to less restrictive alternatives. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) We find that the juvenile court did not abuse its discretion in committing appellant to the DJJ because there is sufficient evidence to show that its decision was reasonable.

The aims of the juvenile system "'are to protect the public and rehabilitate the minor.' [Citations.]" (*In re Calvin S.* (2007) 150 Cal.App.4th 443, 449.) The juvenile court is given broad discretion on the best way to accomplish those goals. (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.)

Here, appellant chose a victim who was particularly vulnerable because of her young age and her relationship to appellant, and the juvenile court had evidence before it from a psychologist that appellant posed a serious risk of reoffending if he was not strictly supervised and held accountable. At the dispositional hearing, a representative of the probation department stated that all available sex offender treatment programs, other than those provided in the DJJ, were noncustodial. The representative also stated that, in the department's view, given the seriousness of the offense, such a local noncustodial treatment program would not be appropriate.

The juvenile court, in rendering its decision, stated that it was "trying to fashion a unique disposition that would best benefit [appellant] in reformation and rehabilitation as well as an element of punishment for his criminal offense …." The court found the psychological evaluation of appellant significant. Although the psychologist did not believe appellant posed an imminent risk of further sexual assault against minors, he opined that appellant was not a good candidate for probation and presented "a serious risk for further criminal or violent behavior if he's in a setting that does not provide strict supervision and accountability." The court stated that it placed great weight on the

opinion of the probation department and its evaluation of local and nonlocal treatment programs. The court noted particularly that, while there were local programs oriented toward punishment and certain types of rehabilitation and treatment, none addressed sex offender treatment in a custodial setting that would assure strict supervision and accountability. The court found electronic monitoring at home inadequate.

The juvenile court noted appellant's intelligence and the fact that he had obtained his GED. It also noted his poor performance on a prior grant of probation in Texas.

Regarding appellant's placement, the court stated:

> "… This court has independently considered the local less restrictive programs, all forms of in-custody as well as not in-custody treatment programs and a combination of custodial and treatment programs and this court also concludes that each of those local programs are inappropriate dispositions for the former minor at this point in time. Court finds that the mental and physical condition of the former minor is such to render it probable that he can benefit from the reformatory educational discipline and treatment programs, specifically the sex offender treatment programs, that can be provided by the California Department of Corrections and Rehabilitation in the Division of Juvenile Justice, and the court does find that [appellant] is not an individual with exceptional educational needs."

The commitment decision of the juvenile court is supported by the evidence. Under these circumstances, we cannot conclude that the juvenile court abused its discretion.

DISPOSITION

The true findings and commitment of appellant to the DJJ are affirmed.